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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 864

UNITED STATES OF AMERICA,

—v.—

GABRIEL McMILLAN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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—v.—

GABRIEL MCMILLAN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, defendant-appellant below, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered on November 15, 1966. The petitioner was sentenced to a term of seven years.

Reasons for Granting the Writ

1. Was there a violation of due process of law by the trail court denying to the petitioner a fair and impartial trial to which the petitioner is entitled as a matter of right?

2. Should the motion to suppress all evidence seized from the person of the petitioner and from the premises located at 352 East 141st Street, Bronx, New York City, have been granted?

3. Did the denial of the motion to suppress all the evidence seized from the person of the petitioner, and from the premises located at 352 East 141st Street, Bronx, New York City, deny to the petitioner a fair trial?

4. Should the trial court have charged the jury on the law of entrapment, as a question of fact to be determined by them, as requested by the petitioner?

Statutes Involved

21 U.S.C.:

> §173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.—It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.
>
> Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United

States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

21 U.S.C.:

§174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

26 U.S.C.:

§4705(a) General requirement.

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C.:

§7237(b) Sale or Other Transfer Without Written Order—Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. If the offender attained the age of 18 before the offense and—

(1) the offense consisted of the sale, barter, exchange, giving away, or transfer of any narcotic drug or marihuana to a person who had not attained the age of 18 at the time of such offense, or

(2) the offense consisted of a conspiracy to commit an offense described in paragraph (1), the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

Statement of Facts

Clarence Cook testified that he is an agent for the Federal Bureau of Narcotics. That on March 8, 1965, at approximately 5 p.m., he was in a candy store with the informant. Sometime thereafter, the informant made a telephone call. At approximately 9 p.m., the appellant entered that store. The informant introduced him to the appellant, as a friend, and the informant told the appellant that he and his friend had $500 and wanted cocaine. The appellant said that he could take care of it and he counted out $500 official advance funds and gave the money to the informant who handed it to the appellant (pp. 20a-21a-22a). At about midnight, the appellant returned to the store and gave the informant a tinfoil package. He, then proceeded to the office of the Federal Bureau of Narcotics, where he placed the tinfoil package containing the white powder in his locker.

On the following day the white powder was removed from the tinfoil package, transferred to a glassine envelope, initialed, weighed and sealed by him, witnessed by Agents Frost and Martowski, and he delivered it to the United States chemist. On March 11, 1965, he went to the same candy store, located at 550 West 146th Street, New York City, at about 6:30 p.m., and met the informant (pp. 24a-26a). At about 7:30 p.m. the appellant entered the store. The appellant and the informant had a conversation which he could not overhear. After the conversation, he handed the informer $500 official advance funds which the informant gave to the appellant. The appellant returned to the store and gave the informant the tinfoil package which the informant handed to

him. The appellant then left the store (p. 26a). The white powder was transferred from the tinfoil to a glassine envelope, initialed, weighed and sealed and delivered to the United States chemist (p. 28a).

He, further, testified on direct examination, that on March 8 and March 11, 1965, he did not offer to or give anyone an order form issued in blank by the Secretary of the Treasury or his delegate (p. 30a). On cross examination, this witness testified that he had met the informer probably a month previous to March 8th. He knew nothing about the informer, except that he was an informer. The informant worked under the direction of Agent John Frost. That Agent Frost was not in the candy store on March 8 and March 11, 1965, at the time that he was in the store. He does not know what the relationship of the informant with the appellant was before March 8th (p. 31a). He does not know whether the informant kept calling the appellant about narcotics, or whether the informant bothered the life out of the appellant about narcotics before March 8th (p. 32a).

He never had any conversations with Agent Frost as to whether the informant was reliable or whether the informant would trick or induce anyone (p. 34a). The reason for this witness to go to the store on March 8th and March 11th was to have the appellant come over and talk about narcotics and to sell him narcotics (p. 36a). He knew practicaly nothing about the informer. He never checked the police record of the informant. He did not know whether the informant was a user of narcotics, and did not know whether the informant was a seller of narcotics (p. 38a). He did not know whether the informant had his candy store there designedly for people to meet

Government agents (p. 38a). He was told the time that the informant would be at the store on March 8th and March 11th (p. 41a). He expected that on March 8th, when he walked into that store that the informant was going to introduce him to the appellant (p. 42a). On March 11th, he walked into that store expecting to meet the appellant (p. 42a). He arrived at the store about 5 p.m. on March 8th, and waited in the store for four hours until the appellant arrived, when he was introduced to the appellant by the informer as a friend of the informant. During the four hours, the informant made two telephone calls, and told him that the calls were made to the appellant's house (p. 46a).

Agent John A. Frost testified that he is employed by the United States Treasury Department, Bureau of Narcotics. He testified, on direct examination, about the surveillance of the appellant by Agent Martowski and himself (p. 54a-58a). On cross examination, he testified that he had arrested the informant, named Lokey, in January, 1965, for a violation of the Federal Narcotic laws, the possession of narcotics. That no indictment was ever returned against the informant. That the informant agreed to cooperate with him before any grand jury proceedings took place against this informant. The informant, Lokey Allen, furnished him with information that resulted in indictments in five or six cases. That the case against the informant, Lokey Allen, was never presented to a grand jury. It was dismissed before the United States Commissioner on the recommendation of the United States Attorney. This witness would have recommended that the case against this informant be dismissed (p. 60a-61a). The informant was convicted of a violation of the narcotic laws some 15 years

ago. The informant, Lokey, is working on several cases. He does not know, of his own knowledge, what went on between the informer, Lokey, and the appellant before March 8, 1965 (p. 62a).

Philip V. Porto, then, testified that he is a chemist employed by the United States Treasury Department, Alcohol and Tobacco Tax Division. He testified as to his background and his experience in analyzing several thousand samples of narcotics. He found that the Government's exhibits, which he received from Agent Cook, contained cocaine, a narcotic drug (p. 93a-99a). David W. Martowski testified that at present, he is attending Fordham Law School, but, before then, he was an agent with the Treasury Department for three years and for a year and a half with the Bureau of Narcotics. He testified about the surveillance of the appellant (p. 107a-108a).

On cross examination, he testified that he had arrested the informant, Lokey. That after he arrested the informant, the informant agreed to work with him. He knew as of today, that the charge against the informant, Lokey, had been dismissed. He did not follow the proceedings in the Court or before the United States Commissioner after he made the arrest (p. 112a-113a). He does not know, of his own personal knowledge, how the informant, Lokey Allen, met the appellant. He does not know, of his own personal knowledge, what prompted the appellant to go to that candy store on March 8th and March 11th (p. 114a). The informant knew that Agent Frost and he were interested in the appellant. The informant, Lokey Allen, made reports to him, before March 8, as to his contacts with the appellant, but the witness did not have such reports with him. At this point, the trial court voluntarily, without any

request, stated "He did not say they were in writing" (p. 121a).

This witness, then, testified that these reports were not in writing. He waited for a call on March 8 and March 11 from the informant, Lokey Allen (p. 122a). He does not know whether the informant, Lokey Allen, was still dealing in narcotics after his arrest in January (p. 124a).

Lokey Allen, the informant, was called by the petitioner as a hostile witness, and testified. He swore that he knew the appellant for a little over two years. He testified that he had been convicted of narcotics and gambling. He was convicted of narcotics in 1951 and received a sentence of three years in jail and five years probation (p. 130a). In January, 1965, he was arrested for the sale or possession of narcotics, and did not know whether the case was dismissed or is still pending. He is married, and earns his living gambling (131a). He takes his wife's money, who is working, to gamble with. He has no job (p. 133a). It was while he had that candy store that he was arrested for narcotics (p. 134a). He spoke to the appellant a number of times about narcotics. He would tell the appellant that he needed narcotics for himself or a friend (p. 137a-138a). He could not recall how many times he spoke to the appellant before March 8th. He telephoned the agents before March 8th to tell them that the appellant was around. He told the agents that he had spoken to the appellant about narcotics, and that he could possibly make a buy from him (p. 140a).

He remembered introducing Agent Cook to the appellant as his friend, but lied when he represented Agent Cook as a man to whom narcotics could be sold and the appel-

lant would be safe. This happened because he was under arrest for narcotics and wanted to help himself. He did not want to serve another three years and five years on probation. He wanted to be a free man (p.141a-142a). He communicated with an agent to tell him that he wanted to help the Government on the day of his arrest, but did not mention the name of the appellant. He mentioned the name of the appellant to the agents, for the first time, at the beginning of March (p. 143a). When he was arrested for possession of narcotics in January, 1965, and agreed to work with the Federal Agents, he had certain persons in mind, but, not the appellant (pp. 145a-146a).

He gambled with a man named Sammy who took his wagers on numbers, baseball, football or any fight. He did not know the last name of Sammy, and he never told any police officer about Sammy (p. 151a). He never knew that the appellant had a store, but there was talk between them about the sale of dresses and bowling balls and so on. The appellant bought dresses and bowling balls from him, and he gave to the appellant his telephone number for the purpose of the sale, purchase of dresses and bowling balls and so on (p. 153a). He is still working with the agents because of his arrest in January (p. 155a). This witness, the informant, Lokey Allen, was called as a hostile witness by the appellant, not by the Government (p. 130a).

REASONS FOR GRANTING THE WRIT

POINT I

The petitioner was denied due process of law by not receiving a fair trial to which petitioner is entitled as a matter of right.

The trial court, by its rulings, denied to the appellant his defense, that of entrapment. There are a number of instances in the trial record that support this claim, but a few will be referred to in order to satisfy this Court that the appellant's right to a fair trial was denied to him. Let us begin with the cross examination of Agent Cook, the first witness called by the Government. An objection was sustained to a question as to whether he knew that the informant had induced the appellant to sell narcotics and also to the question as to whether he knew that the informant would go out of his way to entice the appellant to sell narcotics (p. 32a). The trial court, after the objections were made to these questions, stated: "No, I think he said he does not know anything about the previous relation."

While the witness may have testified that he did not know the relationship of the informant with the appellant before March 8, yet the purpose of cross examination is to try to develop any hidden facts, and thereby establish the truth. When this witness was asked whether all he was interested in was to see a sale of narcotics, the Court sustained an objection on its own, as to the form of the question (p. 35a). When this witness was asked whether the plan was to have the appellant come to the candy store, and he responded "Yes, sir", an objection was sustained by the Court, as to the next question, and that was that the plan was to have the appellant come to the candy store for the purpose of

enticing him into the sale of narcotics. The witness may have said "Yes" in answer to that question, and then the defense of entrapment could have been developed.

But, the trial court, by excluding an answer to that question precluded the appellant from proceeding further with this kind of a cross examination. It is true that the trial court permitted the witness to testify that the object of having the appellant come to the candy store was to have the appellant deliver narcotics. But that testimony, because of the ruling by the trial court, was insufficient to establish entrapment. When this Agent was asked "Did you go to that store on March 8th to meet Lokey?" His answer was "Yes, sir." But when he was then asked "Did you go there having in mind that Lokey deliver somebody to you in the sale of narcotics", an objection was sustained with a comment by the trial court, "Ask about facts, not conclusions." If the court had permitted an answer to that question, then additional questions could have been asked of this witness to try to establish that the appellant had been entrapped.

When the informant, Lokey Allen, was called to the witness stand by the appellant, and the appellant was given permission to examine him as a hostile witness, the trial court, again, by its rulings, denied to the appellant his defense. He testified that he had called the appellant a number of times before March 8 and March 11th, with respect to narcotics. After establishing that this witness wanted to be a free man, he was asked the question, "You thought the best way, then, was to introduce an agent of the Government to McMillan?" The Assistant United States Attorney objected to the question, and the trial court sustained the objection, with the comment, "Do you want

to ask him did he want to help the Government for that reason? All right. I will allow it" (pp. 142a-143a).

The question of entrapment is whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether that person was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade. (*Sherman* v. *U.S.*, 356 U.S. 369.) This ruling, by the trial court, instantly limited the examination of this witness. For another example, of the restriction of cross examination by the trial court, the question as to whether he constantly kept in touch with the appellant, after reporting to an agent that he could make a buy from the appellant was not permitted to be answered on the objection of the Assistant United States Attorney (p. 147a). After establishing the fact that this witness and the appellant bought dresses from each other, for the purpose of showing that the appellant was in the dress business, an objection was sustained by the trial court as to this question asked of this witness: "Knowing he was in the business of buying dresses and selling dresses and so on, nevertheless you spoke to him about narcotics, did you not?" (p. 154a).

It is submitted that that question was most material on the question of entrapment and should not have been excluded. If an answer to this question had been allowed by the trial court, then, a continued examination of this witness could have been conducted for the purpose of showing that the criminal design originated with this informant, and he implanted in the mind of the appellant the disposition to commit the alleged offenses and induced its commission in order that the appellant may be prosecuted.

This Honorable Court stated, in the case of *Sorrells* v. *United States*, 287 U.S. 435, at page 442:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

It was impossible for the petitioner to try to show that the criminal design originated with the informant by the rulings of the trial court in sustaining the objections of the United States Attorney to questions that would have led to the defense of the petitioner, that of entrapment.

In the case of *Alford* v. *United States*, 282 U.S. 687, which was a case of using the mails to defraud, this Honorable Court stated:

> "Cross-examination of a witness is a matter of right. The rule that the examiner must indicate the purpose of his inquiry does not, in general, apply to cross-examination.
>
> • • •
>
> The defense was entitled to show by cross-examination that the testimony of the witness was affected by fear or favor growing out of his detention, and it was immaterial whether he was in custody because of his participation in the transactions for which the defendant was indicted or for some other offense."

In the case of *U.S.* v. *Dardi*, 330 Fed. 2d 316, at page 333, the Court stated:

> "In any event, the trial court advised counsel that if Lehrich was called as part of the defense case, he could be examined on the events of 1955 and 1956 as a hostile witness. Having failed to avail himself of this opportunity, Dardi cannot now complain."

However, in the instant case, the informant, Lokey Allen, was forced to be produced by the Government and was called to the witness stand as a hostile witness by the petitioner.

The instant case, therefore, is to be distinguished from the case of *U.S.* v. *Dardi, supra.*

Whenever questions were asked of the agents as to whether they knew whether the informant would induce the petitioner to sell narcotics, objections were made and objections were sustained.

When the informant was asked the following question:

> "Q. Knowing he (the petitioner) was in the business of buying dresses and selling dresses, nevertheless, you spoke to him about narcotics did you not?"

objection to that question was sustained.

In the case of *Sherman* v. *U.S.*, 356 U.S., 369, the informant was asked the following question:

> "Q. That is right, and knowing that he, meaning the defendant was there for the treatment of narcotic addiction, to get away from the habit, you nevertheless broached the subject to him as to where he could get narcotics from, is that correct, yes or no?"

The answer to that question was "I approached him on the subject, yes."

Does entrapment end when anyone leaves a doctor's office? By the Court sustaining an objection to the question that the petitioner being in a legal, legitimate business, and being approached by the informant nevertheless about narcotics, prevented the petitioner from presenting clearly before the jury the whole picture of any and all alleged transactions and the possession of cocaine.

Surely, the law of entrapment applies to a business man just as it applies effectively to a man in a doctor's office. But, apparently the trial court did not accept this version.

In the case of *U.S.* v. *Lombardozzi,* 335 Fed. 2d 414, at page 416, the Court stated:

> "During cross-examination appellants sought to elicit the place of employment of an important Government witness. The trial court allowed extensive cross-examination but sustained an objection to a question seeking to ascertain whether the night club in which witness was working as a bouncer was in New York City. Even on appeal appellants have not demonstrated the materiality or relevance of this information. Alford v. United States, 282 U.S. 687, supports the discretion of the trial court in deciding how far afield cross-examination should go."

In the aforementioned case, the appellants endeavored to find out where the witness was working, to which question an objection was sustained.

In the case at Bar, however, the questions propounded to the agents as to the activities of the informant, were most important to the petitioner's defense and were excluded by the court.

As a matter of fact, a mere reading of the cross-examination of the Government informant, and the Government agents will indicate to this honorable court that the petitioner was restricted unreasonably in cross-examination of the informant.

POINT II

The motion to suppress all evidence seized from the person of the petitioner and from the premises located at 352 East 141st Street, Bronx, New York City, should have been granted.

According to the indictment and according to the testimony given at the trial, there were two sales of cocaine, allegedly made by the petitioner, on March 8, 1965 and March 11, 1965. The search and seizure did not take place until April 6, 1965. There was a lapse of approximately 3 weeks between the date of the last alleged sale of cocaine and the date when the agents, without a search warrant or a warrant of arrest, entered the premises in Bronx County, New York City, and seized a plastic bag containing narcotics.

When the agents arrived at the apartment, the evidence discloses that a Miss Johnson was in the apartment. The evidence further discloses that when Miss Johnson was asked whether she resided in the apartment, her answer was "yes". So that the petitioner did not have exclusive possession of everything in the apartment. As a matter of fact, it is contended that the petitioner did not even know that this plastic bag of cocaine was in the apartment, because he did not have exclusive possession of everything in that apartment. Nevertheless, the court denied the motion to suppress.

In addition, it might be submitted that there was entrapment of the petitioner, as far as the alleged possession of that plastic bag, which was the fifth count in the indictment.

The agents testified that they had telephoned the informant 2 or 3 times, and the informant telephoned the petitioner. The agents further testified that upon reaching the premises in the Bronx, and before endeavoring to enter the petitioner's apartment, they called the informant.

These facts should clearly indicate to this honorable court that the petitioner was a marked man, subject completely to entrapment by the Government agents.

POINT III

The denial of the motion to suppress all the evidence seized from the person of the petitioner and from the premises located at 352 East 141st Street, Bronx, New York City, denied to the petitioner a fair trial.

The jury, being in a position to observe a large plastic bag of cocaine being admitted into evidence, surely had to be impressed by it which was found in the apartment occupied by both the petitioner and Miss Johnson.

A jury is composed of ordinary laymen, who are probably more impressed by exhibits introduced during the conduct of a trial than sworn testimony; if not, it is submitted, just as impressed.

This Honorable Court held in the *Sheppard* case that newspaper publicity, television and radio would impress a jury and deny to a petitioner a fair trial. Is it any dif ferent where a jury sees and has before it a large envelope

containing cocaine, which should never have been received in evidence? This tended to deny to the petitioner due process of law, by denying him a fair trial.

The motion to suppress all of that evidence should have been granted.

POINT IV

The trial court should have charged the jury on the law of entrapment, as a question of fact to be determined by them, as requested by the petitioner.

The petitioner, among many requests, asked the trial court to submit the question of entrapment, as a matter of fact, to the jury. This, the trial court refused to do.

It is submitted, from all the attending circumstances, the many telephone calls made by the informant, the appearance of the petitioner at the informant's candy store in response to the calls made by the informant, and the informant knowing that the petitioner was engaged in a legal, legitimate occupation, that of selling and buying dresses, bowling balls, etc., and nevertheless approaching the petitioner about narcotics, surely there was enough established to, at least, have the question of entrapment submitted to the jury as a question of fact.

In the case of *U.S.* v. *Sawyer*, 210 Fed. 2d 169, the Court held that the issue of entrapment should have been submitted to the jury with an appropriate explanation of the legal prerequisites of that defense. The Court further said at page 171:

"We think the evidence in this case raised a sufficient question whether defendant was disposed to trade in narcotics or yielded to importunations contrary to his own inclination, so that the issue of entrapment should have been submitted to the jury with an appropriate explanation of the legal prerequisites of that defense."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HENRY A. LOWENBERG
Attorney for Petitioner

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 153—September Term, 1966.

(Argued October 27, 1966 Decided November 15, 1966.)

Docket No. 30694

UNITED STATES OF AMERICA,

Appellee,

—v.—

GABRIEL McMILLAN,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and KAUFMAN, *Circuit Judges.*

Appeal by defendant Gabriel McMillan from a judgment of conviction by the United States District Court for the Southern District of New York, Frederick vanPelt Bryan, *J.*, sitting with a jury, on five counts of selling and possessing narcotics in violation of 21 U. S. C. §§173, 174; 26 U. S. C. §§4705, 7237.

Affirmed.

DOUGLAS S. LIEBHATSKY, Assistant United States Attorney, New York, N. Y. (Robert M. Mor-

genthau, United States Attorney for the Southern District of New York and Elkan Abramowitz, Assistant United States Attorney, New York, N. Y., on the brief), *for appellee.*

HENRY A. LOWENBERG, New York, N. Y., *for appellant.*

LUMBARD, *Chief Judge*:

Gabriel McMillan appeals from a judgment of conviction entered June 16, 1966, on five counts of selling and possessing narcotics, in violation of 21 U. S. C. §§173, 174; 26 U. S. C. §§7405(a), 7237(b), by Judge Bryan, sitting with a jury. Following his conviction after a three-day trial, McMillan was sentenced to seven years on each of five counts, to run concurrently. The first four counts related to sales of narcotics to agent Clarence Cook in a Manhattan candy store on March 8 and March 11, 1965; the fifth count stemmed from the discovery of four bags of narcotics at the time of McMillan's arrest in his apartment on April 6, 1965.

After the government had adduced evidence of the sales and possession of the narcotics through testimony of two narcotics agents, the defense called Lokey Allen who had introduced the agents to the defendant. Lokey Allen confirmed the sales and further testified that he had known McMillan for more than two years (during which time Allen had been arrested on a narcotics charge and subsequently released), and had purchased narcotics from McMillan on prior occasions. McMillan himself did not testify

and defense counsel failed to elicit any evidence which would suggest that McMillan had been entrapped.

McMillan raises two points on this appeal:

(1) That he was deprived of the defense of entrapment because of the trial court's rulings which excluded certain testimony and,

(2) That his motion to suppress the four bags of narcotics, found at the time of his arrest, was improperly denied, and constituted reversible error.

The uncontroverted evidence shows that McMillan was "ready and willing without persuasion . . . to commit the offense," *United States* v. *Sherman,* 200 F. 2d 880, 882 (2 Cir. 1952), and as such he was not entitled to a jury charge on entrapment, *United States* v. *Bishop,* —— F. 2d —— (2 Cir. Oct. 26, 1966); *United States* v. *Riley,* 363 F. 2d 955, 959 (2 Cir. 1966). Similarly, he was not entitled to such a charge as the evidence, at most, showed "mere solicitation" by the government, *United States* v. *Berry,* 362 F. 2d 756, 758 (2 Cir. 1966), as opposed to inducement.

McMillan apparently concedes that the evidence in the record does not entitle him to a charge on entrapment. The record does not support McMillan's claim that the trial judge's ruling improperly restricted him in his attempt to develop a possible defense of entrapment.

McMillan also argues that the four bags of narcotics upon which count five was based should not have been admitted into evidence, since search of his person and apartment and the resultant seizure of the narcotics was unlawful in that the arresting agents did not have either an arrest or a search warrant at the time. The argument rests on the assumption that ample time existed for the

obtaining of a warrant, an assumption which does not appear to be valid in light of the fact that the agents were required to move quickly upon first learning of McMillan's newly received supply of narcotics at 4:30 P.M. on the day of arrest.

Nevertheless, assuming *arguendo* that the agents could have obtained a warrant, we hold that it is unnecessary to do so. An arrest without a warrant is proper if the agents had probable cause, see Narcotics Control Act of 1956, 26 U. S. C. §7607, *Wong Sun* v. *United States*, 371 U.S. 471, 478 n. 6 (1963) as the agents clearly had in this case and which McMillan also concedes. A search incident to a lawful arrest is also proper, regardless of whether it might have been practicable to obtain a search warrant in the meantime, *United States* v. *Rabinowitz*, 339 U. S. 56, 65-66 (1950); *United States* v. *Francolino*, —— F. 2d —— (2 Cir. Nov. 3, 1966).

McMillan raises for the first time an additional objection to the admission of the plastic bag containing heroin which was found in his bedroom in an apartment which he shared with another. In addition, two packages of heroin were found on his person and a third such package McMillan dropped on the floor when arrested. No objection having been made at trial to the admission of the package found in the bedroom, we need not consider this matter on appeal, *Uinted States* v. *Indiviglio*, 352 F. 2d 276 (2 Cir. 1965), cert. denied, 383 U. S. 907 (1966). In any event, the fourth bag was properly admitted as evidence in support of conviction on count five as the surrounding circumstances made it logical to infer that the bag was under the control of McMillan, see *Brothers* v. *United States*, 328 F. 2d 151, 155 (9 Cir.), cert. denied, 377 U. S. 1001 (1964).

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 864

GABRIEL MCMILLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 209–212; Pet. App. 22–24) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1966 (R. 213; Pet. App. 21). The petition for a writ of certiorari was filed on December 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly refused to give an instruction on entrapment.

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2. Whether petitioner was precluded from showing entrapment by the court's rulings during the cross-examination of a government witness and a government informer.

3. Whether evidence seized incident to petitioner's arrest without a warrant was admissible.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of New York petitioner was convicted of two illegal sales of narcotics on March 8 and 11, 1965, and of concealment of narcotics on April 6, 1965 (R. 4–6, 186–187). He was given concurrent sentences of imprisonment for seven years (R. 205–206). On appeal the conviction was affirmed (R. 207–208, 213).

The evidence showed that on March 8, 1965, Lokey Allen, who operated a candy store at 500 West 146th Street in New York City, introduced agent Cook to petitioner as a friend, and told petitioner that they had $500 for some cocaine. When petitioner said he could take care of them, Cook gave $500 to Allen, who handed it to petitioner (R. 22). Petitioner then left. About midnight he delivered to Allen a tinfoil package, later found to contain cocaine hydrochloride, which Allen turned over to Cook (R. 23–26, 95). On March 11, 1965, Cook and Allen made another $500 purchase from petitioner, who promised that the "coke" would be better than last time (R. 26–29, 44, 95–96).

On April 6, 1965, Allen told narcotic agent Frost (who had surveilled the prior sales) that petitioner

had asked Allen to get an adulterant for some cocaine (R. 72–73). Frost had Allen telephone petitioner's apartment to ascertain that he was there (R. 73). After Frost had stationed agents in the vicinity of the apartment, Frost instructed Allen to telephone petitioner and tell him that he (Allen) had the adulterant available and that petitioner should come for it immediately (R. 73–74). At about 7:45 p.m., as petitioner started to leave his apartment, the officers identified themselves as federal agents and placed him under arrest (R. 74, 85). Petitioner dropped one tinfoil package containing cocaine hydrochloride on the floor. Two similar packages were taken in a search of his coat pocket (R. 74, 85, 89–90, 96–97). During a search of the apartment the agents seized from a top bureau drawer in the bedroom a plastic bag containing two ounces of cocaine (R. 75, 90–91, 97–98).

Allen was called by defense counsel who was allowed to examine him as a hostile witness (R. 134–135). Allen testified that he had known petitioner about two years (R. 130), and had talked with him about narcotics prior to March 8 (R. 135–136). He had been informed that petitioner had narcotics and that he should make purchases from petitioner. Sometimes petitioner contacted Allen to say that he had narcotics (R. 139, 148).

ARGUMENT

1. The trial court denied petitioner's request for an instruction on entrapment, finding that no evidence had been presented to raise such an issue (R. 159–161). As the court of appeals found, this ruling was

fully justified on the record in this case. Not only did petitioner willingly sell narcotics to the agent on March 8 and March 11, but the testimony of Allen shows that petitioner had willingly sold to the informant before that time. Allen testified that he approached petitioner after being informed that petitioner had narcotics; that petitioner made sales to Allen before March 8; and that sometimes petitioner himself told Allen that he had narcotics. None of this evidence was refuted. Moreover, the possession of cocaine on April 6 (the basis of count 5, which alone would support the sentence) obviously was not the product of any encouragement by the government. There was therefore no error in failing to give an instruction on entrapment. *United States* v. *Place,* 263 F. 2d 627, 629 (C.A. 2), certiorari denied, 360 U.S. 920; *United States* v. *Berry,* 362 F. 2d 756, 758 (C.A. 2); *United States* v. *Gosser,* 339 F. 2d 102, 109 (C.A. 6), certiorari denied, 382 U.S. 819.

2. The trial court did not, as petitioner contends (Pet. 11–17), preclude petitioner from showing entrapment by rulings on questions put to agent Cook and Allen by defense counsel. A reading of the record shows that counsel was allowed wide latitude on cross-examination. For example, counsel was allowed to ask agent Cook whether he knew if the informant "bothered the life" out of petitioner before March 8. However, after the agent had answered in the negative, the judge properly sustained other questions introduced by "You would not know * * *" (R. 32–33). Typical of the difficulty the court had with defense

counsel's questions is the colloquy which occurred after defense counsel asked whether the plan was to have petitioner come to the candy store for the purpose of enticing him into the sale of narcotics. The court said (R. 36):

> No, I will sustain an objection. I want you to understand the nature of why I am sustaining this objection. These words of art that you are using, words like "enticing, induced," and so forth, you can go into any subject matter that I consider legitimate, but questions of that nature, in my judgment, are not proper.
>
> Mr. LOWENBERG [petitioner's counsel]. I have the Sherman case, Judge——
>
> The COURT. That is not the case. The point is that the choice of language is not proper. You may reframe your question into what I consider to be the proper language.

Similarly, a reading of the examination of Allen (R. 133–155) shows that petitioner was not precluded from bringing out the facts, although the court did sustain objections to repetitious or conclusory questions. Petitioner particularly complains that the court sustained an objection to the question, "Knowing he was in the business of buying dresses and selling dresses and so on, nevertheless you spoke to him about narcotics, did you not" (R. 154). This came after Allen had been extensively examined as to his dealings with petitioner with respect to narcotics (R. 136–137), the nature of his first dealings with petitioner (R. 139), and the fact that petitioner had bought various items from Allen, including dresses (R. 153–154). Nothing

in Allen's answers, however, supported the assumption that Allen knew petitioner was in the business of buying and selling dresses. The question was improperly phrased and the court correctly sustained an objection. By so doing, it did not preclude a defense of entrapment.

3. A motion to suppress the narcotics seized from petitioner's person and from his apartment at the time of his arrest was properly denied. There was probable cause for the arrest without a warrant, since the agents knew at about 4:30 p.m. on April 6, 1965, that petitioner was seeking an adulterant for narcotics then in his possession. They were justified in believing they would have to act quickly before the supply could be distributed. As noted by the court of appeals, narcotics agents have specific statutory authority to arrest without a warrant on probable cause. 26 U.S.C. 7607. See *Wong Sun* v. *United States,* 371 U.S. 471, 478, fn. 6; *Draper* v. *United States,* 358 U.S. 307. The search incidental to the lawful arrest was also proper. *United States* v. *Rabinowitz,* 339 U.S. 56, 63–64; *Harris* v. *United States,* 331 U.S. 145, 150–151.

When the agents searched petitioner's apartment on April 6, a woman who was present said that she lived there (R. 74, 93). On the basis of this statement, petitioner argued, for the first time in the court of appeals, that it was error to attribute to him possession of the cocaine found in a plastic bag in the bedroom. The seizure of contraband narcotics uncovered during the lawful search of petitioner's apart-

ment would have been proper even if they had not belonged to petitioner, and there was therefore no reason to suppress the evidence. The jury was entitled to conclude that the narcotics were petitioner's, not only because the apartment was his, but because other narcotics were found on his person, and because the evidence showed him to be a dealer in narcotics. In any event, the narcotics found on petitioner's person would alone support the conviction on count 5.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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